

G. JON AND KATHERINE M. ROUSH

IBLA 88-44

Decided January 9, 1990

Appeal from a decision of the Area Manager, Dillon Resource Area, Montana, Bureau of Land Management, denying protest of timber sale. MT-076-TS-007.

Affirmed.

1. Environmental Quality: Environmental Statements--Timber Sales and Disposals

BLM may properly proceed with a proposed timber sale where the environmental assessment adequately considered all relevant matters of environmental concern, including the impact of clearcutting and roadbuilding on moose and elk populations, the hydrologic and vegetative character of the sale area and water quality in local streams, and where the finding that the sale would not significantly affect the human environment was supported by the record and was reasonable.

APPEARANCES: Philip D. Tawney, Esq., and Robert M. Knight, Esq., Missoula, Montana, for appellants; Richard L. Graf, Darby Lumber, Inc., for Darby Lumber, Inc.; John C. Chaffin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

G. Jon and Katherine M. Roush (the Roushes) have appealed from a decision of the Area Manager, Dillon Resource Area, Montana, Bureau of Land Management (BLM), dated August 27, 1987, denying their protest against the Yank Swamp timber sale (MT-076-TS-007).

In January 1984, consistent with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1982), BLM prepared an environmental assessment (EA) of the impact of a timber harvest

in the Yank Swamp area in Beaverhead County, Montana. 1/ The EA was prepared by an interdisciplinary team of BLM employees, including a forestry technician, natural resources specialist, wildlife biologist, range conservationist, and soil scientist. BLM considered three alternative timber harvests and a no-action alternative.

Of these four alternatives, BLM ultimately selected Alternative A, which involved the removal of 2,555 thousand board feet (MBF) of timber from 190 acres in 8 units and the construction of 2.7 miles of roads, over a 10-year period. 2/ The land involved in Alternative A was situated both north and south of Yank Swamp (EA at Exh. F-1). Timber harvesting was to be done by means of clearcutting, and various measures were included in the EA to mitigate the environmental impact of the harvest. In particular, BLM provided that cutting units would be restricted to 40 acres or less and generally be separated by strips of uncut timber for wildlife cover. Yarding was to be accomplished on "relatively dry ground or frozen ground." Slash was to be either carried away by the public for use as firewood or piled and burned (EA at 2).

The EA was approved by the Area Manager on April 2, 1984. On that date, he also signed a "Record of Decision and Finding of No Significant Impact" (ROD-1), in which he expressly approved timber harvesting pursuant to Alternative A. Eight "harvest units" were slated for clearcutting. Of these, Harvest Unit 8 was by far the largest, comprising approximately 150 acres. The other seven units were substantially smaller (ROD-1 at Exh. A). In addition, specific harvest methods were set out for these harvest units (ROD-1 at 2-4).

ROD-1 imposed additional protective conditions on the harvest which were more restrictive than those set out in the EA. Logging activities were prohibited from January 1 through July 1 each year and restricted to "the drier season." Public use of slash for firewood was eliminated for the harvest units where there was no public access in order to minimize human disturbance of wildlife. Harvesting was required to be generally arranged to allow "hiding cover" to regenerate and to leave timber buffers

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1/ Yank Swamp is principally situated in T. 3 S., R. 17 W., Principal Meridian, in an area including public, private, and National Forest land totalling 10,376 acres. Of these, 3,970 acres are covered by coniferous forest, 1,551 acres are either partially cut or clearcut, 2,980 acres are covered by grass and/or sagebrush, and 1,875 acres are in the swamp (EA at Exh. F-1; Timber Sale Prospectus at Exh. A). Although the area has been logged in the past, it bears dense stands of lodgepole pine approximately 120 years old. According to the EA, these stands are mature, but mistletoe-infected, and are not producing at a desirable growth rate. Further, the trees are said to be at risk of destruction by the Mountain Pine bark beetle (EA at 3-4, 9).

2/ Alternative B involved the harvesting of 1,955 MBF of timber from 150 acres and the construction of 2.4 miles of roads. Alternative C involved the harvesting of 1,500 MBF of timber from 100 acres and the construction of 2.6 miles of roads.

to mitigate impact on big game. All roads developed for timber harvest were to be closed upon completion of use. The Area Manager concluded in ROD-1 that the proposed timber sale would have no significant effect on the quality of the human environment and thus did not require preparation of an environmental impact statement (EIS).

The record indicates that BLM did not go forward with the proposed Yank Swamp timber sale for some time following issuance of ROD-1. Three years later, on April 21, 1987, the Area Manager signed an updated ROD (ROD-2) to take into account "additional public input of concerns and additional mitigation measures recommended by the Dillon [Resource] Area staff" (ROD-2 at 1). <sup>3/</sup> ROD-2 again approved timber harvesting pursuant to Alternative A, identifying the same eight harvest units and generally retaining the harvest methods set out in ROD-1. Timber harvesting was made subject both to the conditions and exceptions specified in ROD-1, and additional restrictions. ROD-2 provided that harvest operations would be suspended from December 1 through July 1 of each year or "when moose start to concentrate in the harvest area prior to December 1." Also, it evidently barred all public use of slash, providing instead that approximately 15 tons of slash per acre would be left to protect willow and aspen regeneration and inhibit soil movement. As to Harvest Unit 8, ROD-2 stated that, "if logging operations are shut down as per the general conditions and stipulations \* \* \*, the operator will be allowed to operate in the following year during the months of August and September to complete the harvest." In ROD-2, the Area Manager again concluded that preparation of an EIS was not required.

The timber sale was offered by notice first published on June 22, 1987. Prior to that date, on June 17, 1987, BLM evidently mailed the Yank Swamp timber sale notice and prospectus to several people, including the Roushes. BLM authorized the removal of 1,088 MBF of timber by clearcutting 103 acres and the construction and reconstruction of 4.1 miles of roads over a 36-month period. <sup>4/</sup> The sale was offered as five "sale units" and a right-of-way. These five "sale units" do not correspond to the "harvest units" described in the ROD's. Thus, Sale Unit 1 consisted of a portion of Harvest Unit 5, Sale Units 2 through 4 consisted of portions of Harvest Unit 8, and Sale Unit 5 consisted of a portion of Harvest Unit 2.

The prospectus listed some of the restrictions discussed above and evidently incorporated the others by general reference. <sup>5/</sup> It also imposed

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<sup>3/</sup> The record as submitted does not document this additional public input.

<sup>4/</sup> The acreages to be clearcut in the five sale units are as follows: Sale Unit 1: 8 acres; Sale Unit 2: 38 acres; Sale Unit 3: 33 acres; Sale Unit 4: 19 acres; and Sale Unit 5: 5 acres.

<sup>5/</sup> The prospectus stated, "These stipulations are shown below in condensed form. The wording is subject to change, addition, or modification. The exact clauses as they will appear in the contract may be reviewed at the Dillon Resource Area office." The case record contains a copy of the contract, including protective special provisions implementing the restrictions applied by BLM. Appellants have not challenged the contents of these special provisions.

other protective conditions designed to protect stream channels in Sale Unit 4, to ensure that access roads into the sites would be blocked following completion of logging, to provide funds to control noxious weeds on disturbed areas, and to require the removal of any debris that might enter stream courses as a result of the logging. Also, road building and harvest operations in Sale Units 2, 3, and 4 were required to be completed within one operating season, unless authorized by BLM.

The notice stated that the sale would be held on July 14, 1987, and that protests of the sale "must be filed within 15 days after the first publication of this notice," which was on June 22, 1987. The deadline for filing a protest was therefore July 7, 1987. On July 7, 1987, BLM received a letter from the Roushes' attorney requesting an additional 10 days to protest the sale. The record indicates that, by letter dated July 8, 1987, the Area Manager purported to extend this deadline until July 16, 1987. The effect of this action is discussed below.

Being aware that a protest against the sale might be filed, BLM, on July 14, 1987, issued a Notice to Bidders informing them that, "[b]y letter received July 9, 1987, the Big Hole Rancher Association and G. Jon Roush protested [BLM's] plan to offer the Yank Swamp Timber Sale." <sup>6/</sup> The notice informed prospective bidders that BLM would delay awarding the timber sale contract pending its disposition of that protest and that further delays in timber operations might result should the Board grant a stay of implementation of a BLM decision denying the protest and proceeding with the timber sale.

The timber sale was held on July 14, 1987, and Darby Lumber, Inc. (Darby), was declared the high bidder. Darby had acknowledged receipt of the Notice to Bidders on that date. Thereafter, on July 16, 1987, prior to awarding the timber sale contract to Darby, the Roushes filed their protest challenging the planned timber sale.

In his August 1987 decision, the Area Manager denied the Roushes' protest, addressing each of the concerns raised by them. The Roushes (appellants) have appealed from the Area Manager's August 1987 decision, incorporating into their statement of reasons for appeal (SOR) all of the concerns raised in their protest, which we will address *seriatim*.

First, however, we will address the question of whether the Area Manager properly extended the deadline for appellants to file their protest. The regulations, 43 CFR 5000.3, set out the protest procedures as follows:

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<sup>6/</sup> Apart from the request for extension filed by the Roushes on July 7, 1987 (discussed above), we are unable to locate in the casefile any letter filed on July 9, 1987, protesting the sale. It appears either that BLM has failed to provide us with the complete administrative file regarding this dispute, or that it misstated the circumstances surrounding the protest in this notice.

(a) Protests of a forest management decision, including advertised timber sales, may be made within 15 days of the publication of a notice of decision or notice of sale in a newspaper of general circulation.

(b) Protests shall be filed with the authorized officer and shall contain a written statement of reasons for protesting the decision.

(c) Protests received more than 15 days after the publication of the notice of decision or the notice of sale are not timely filed and shall not be considered. [Emphasis supplied.]

No provision is made in the regulations for a BLM officer to extend the time for filing, and it is clear that the consequences of an untimely filing are that the protest may not be considered.

The deadline for filing is established by regulation, which has the force and effect of law. Thus, both the Area Manager and this Board are bound to follow it. Accordingly, we hold that it was error for the Area Manager to extend the deadline for filing a protest and to consider the merits of the protest. Nevertheless, our review of the merits of BLM's decision indicates that it was correct.

[1] Appellants broadly assert that the environmental review process was biased in favor of permitting the timber sale to proceed. There is no evidence of bias. As will be further developed below, we conclude herein that the record demonstrates that BLM took a hard look at the question of whether and under what conditions to proceed with the sale, considering all relevant matters of concern to the environment, and that the decision to proceed was based on this review and was reasonable. That appellants would take a different approach neither establishes that the review process was flawed nor vitiates the Area Manager's April 1987 ROD. See Hoosier Environmental Council, 109 IBLA 160, 170 (1989); The Shoshone-Bannock Tribes, 108 IBLA 198, 201 (1989).

#### BLM's Finding of No Significant Impact

Appellants' principal contention is that BLM failed to properly assess the environmental impact of proceeding with the Yank Swamp timber sale, in violation of section 102(2)(C) of NEPA. Appellants specifically argue that BLM has failed to recognize that the timber sale will result in significant environmental impacts, which require either cancellation of the sale or deferral of the sale pending preparation of an EIS.

It is well established that the Board will affirm a finding of no significant environmental impact with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 173-74 (1984). The record must establish that the finding of no significant impact was based on "reasoned decision making." Fritiofson v. Alexander, 772 F.2d 1225, 1236 (5th Cir. 1985).

Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). The ultimate burden of proof is on the challenging party. In re Blackeye Again Timber Sale, 98 IBLA 108, 110 (1987). Such burden must be satisfied by objective proof. In re Upper Floras Timber Sale, 86 IBLA 296, 305 (1985). Mere differences of opinion provide no basis for reversal. See Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975); Curtin Mitchell, 82 IBLA 275, 282 (1984).

Appellants contend that the timber sale will significantly affect moose and elk populations which use the sale area, asserting that the reduction of timber resulting from the sale will displace these animals and reduce thermal and security cover for them, and that they will be affected by increased human and cattle use. The record reflects that BLM was keenly aware of these possibilities and made a careful review of them.

BLM acknowledged in the EA that public lands surrounding Yank Swamp generally represent an "island of relatively undisturbed habitat in the lower Ruby Creek-Swamp Creek drainages." It noted that extensive clearcutting and road building in adjacent National Forest land had reduced the value of that land for wildlife and that, as a result, the lands considered for sale had "extremely high wildlife values," and that the Yank Swamp area provides "high quality habitat for elk [and] moose" because it constitutes the "only substantially timbered wildlife habitat in the area." BLM further noted that elk use the Yank Swamp area primarily from spring through fall, with calving occurring from mid-June to mid-July, and that moose use the area year-round, with critical use occurring in the fall and winter (EA at 5).

BLM stated in the EA that timber harvesting in the Yank Swamp area would "seriously impact" moose and elk habitat, particularly reducing or eliminating moose and elk use in the continuous block of timber south of Yank Swamp due to the removal of thermal and security cover (EA at 10). BLM, noting that each of the timber harvest alternatives would reduce the effective cover in the area, stated: "Although the changes appear minor in acres lost compared to the existing situation, the true impact must be assessed from the standpoint that those acres occur in the only remaining continuous block of effective habitat within the HAU [habitat analysis unit], making a very poor cover ratio even worse. It must be noted that the existing situation with poor cover-forage ratios, high road density, and low habitat effectiveness already exceeds recommended acceptable levels for maintaining moose yearlong use and elk spring, summer or fall habitat and use \* \* \*." <sup>7/</sup> BLM stated in the EA that the preferred recommendation regarding timber harvesting in the HAU was "[n]o harvest" (EA at 11). In the alternative, BLM recommended that timber harvesting proceed subject to certain conditions, including the preclusion of timber harvesting from

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<sup>7/</sup> BLM stated that timber harvesting would reduce effective cover from 1,008 acres to 837 acres under Alternative A, with a habitat effectiveness ratio of 53 percent (EA at 10).

December 1 to July 1 in order protect moose winter and elk spring use. As noted above, these restrictions, and others, have been imposed on the sale as offered.

Appellants take particular note of BLM's recommendation of "[n]o harvest" in the EA. However, the "no harvest" recommendation in the EA was made with respect to much larger areas than are encompassed by the five sale units now included in the Yank Swamp timber sale. While the EA considered the effect of clearcutting 190 acres, the actual sale offered only 103 acres.

It should be recalled that our concern in this appeal is limited to the effects of the timber sale under protest. There is some doubt whether BLM will offer more sales under the EA and the ROD's. If it does not, there can be little doubt that BLM has made adequate accommodations to the protection of animal life in the Yank Swamp area. If more sales are offered, they will be subject to further environmental review, including consideration of their effects on animals, at the time they are offered. Of course, conditions affecting this question, including regeneration of vegetation on previously clearcut areas, will have changed at such time any further sales are authorized, and the effects of future sales will be judged in light of such changes.

We cannot say what relevance the "no harvest" recommendation in the EA has with respect to the substantially scaled-down acreage of the sale as offered, especially since the Area Manager incorporated the condition recommended in the EA that no timber harvesting occur from December 1 through July 1. 8/ The sale was evidently scaled down expressly to reduce the impact of timber harvesting on moose and elk. Whether, given this new situation, BLM has ensured that moose and elk will not be significantly affected is the issue which appellants must address. It will not suffice to say that BLM, at one time under other circumstances, favored no timber harvesting. 9/

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8/ In support of their contention that the timber sale will have a significant impact on moose and elk, appellants have also offered an analysis of the sale by W. Leslie Pengelly, a "[n]ationally-recognized wildlife researcher" (Exh. 2 attached to Protest). In addition, they make reference to an analysis by Joel Peterson, a wildlife biologist with the Montana Department of Fish, Wildlife and Parks, which analysis is contained in an Apr. 16, 1984, letter to BLM. See Protest at 25. Those analyses, however, were of the original timber sale considered in the EA and not the final timber sale adopted by BLM. In any case, nowhere does either Pengelly or Peterson assert that the sale will have a significant impact on moose or elk. While appellants point to the conclusion of the Fish and Wildlife Service that the timber sale will significantly affect moose and elk, that conclusion was also based on the timber sale as it was considered in the EA.

9/ Appellants also refer to anticipated impacts from timber harvesting on wildlife habitat in the final sale area as set forth in a January 16, 1986, "monitoring report" prepared by the BLM wildlife biologist who participated in preparation of the EA, concluding that, "[f]rom this commentary alone,

South of Yank Swamp, there is a largely continuous block of timber in secs. 23 and 26 that covers between 200 and 300 acres (EA at Exh. F-1). Much of this block was included in Harvest Unit 8, which was to be clear-cut under the proposal considered in the EA. As noted above, significant restrictions were placed on the harvesting of this area in ROD-2 in 1987. The timber sale as ultimately offered involves the harvesting of only 98 out of the total of 200 to 300 acres in this continuous block, leaving a block of timber adequate (in the words of the EA at page 10) to "sustain current levels of winter moose use." Appellants have offered no evidence to suggest that Sale Units 2 through 4, which were derived from Harvest Unit 8, do not fulfill the intent of the ROD or that, given such sale design, timber harvesting will significantly affect moose and elk populations.

Appellants also argue that the timber sale violates the recommendations of the Coordinating Elk and Timber Management: Final Report of the Montana Cooperative Elk-Logging Study, 1970-1985 (Elk-Logging Study) which were endorsed by the State Director, Montana, BLM, in September 1984 (Protest at 17). Appellants note that the study recommends the "selective withdrawal" of moist summer range sites interspersed with trees from timber harvesting, along with protection of "peripheral zones," because of the importance of these areas for elk. Id. at 19.

The subject area is evidently properly characterized as a moist summer range site interspersed with trees. However, even assuming that the Elk-Logging Study were binding upon BLM, we cannot say that the subject timber sale violates it. <sup>10/</sup> The study did not require that particular sites not be subjected to timber harvesting, but left the decision of which sites to withdraw from timber harvesting to the discretion of BLM. Indeed, the study states that "[t]here may be situations in which one [or] more of these recommendations may not be applicable to local conditions." Id. at 19.

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fn. 9 (continued)

the BLM's planned timber harvest will undoubtedly have a significant effect on a critical elk and moose habitat area" (Protest at 22, 23). Likewise, we note that this same wildlife biologist, in a Nov. 10, 1986, memorandum to the Area Manager, indicated his continuing opposition to the timber sale, stating that there was "not enough space and flexibility [in the sale area] to accommodate wildlife recommendations and needs" (Exh. 5 attached to Answer at 1). However, nowhere in either of these analyses did the BLM wildlife biologist conclude that the sale would significantly affect moose or elk.

<sup>10/</sup> As BLM points out in its answer, the Elk-Logging Study is not legally binding upon BLM because it does not constitute a duly promulgated regulation of the Department. See Lane County Audobon Society, 55 IBLA 171, 174-76 (1981). The study is adopted only as a matter of practice by BLM managers. As BLM states, while "[t]here has been no formal policy guidance from the State Director requiring adoption of the Elk Logging Study recommendations, BLM managers endorse the study and use it in planning and making decisions where potential elk and logging conflicts exist, such as Yank Swamp" (Answer at 18).



Nor does the timber sale violate the spirit of the study. The record indicates that BLM considered the importance to elk of the Yank Swamp area as a moist summer range site interspersed with trees in its final design of the timber sale. In the case of Sale Units 2 through 5, which border Yank Swamp, the Area Manager stated in ROD-2 that "[s]mall clearcuts adjacent to Yank Swamp will be arranged in a manner to provide necessary screening and security cover" (Sale Unit 5) and "[n]o more than one-third of the timber will be removed directly adjacent to Yank Swamp in the first entry" (Sale Units 2 through 4). In addition, BLM states in its answer: "[B]oundaries in [Sale Unit 2] were adjusted to avoid adverse impacts of cutting to the edge of a bog/meadow. Unit 4 was also significantly redesigned to avoid an extensive wet area." In any event, appellants have not demonstrated that timber harvesting, to the extent it will encompass timber interspersed in the moist portion of the Yank Swamp area, will significantly affect elk by altering this aspect of their habitat.

Appellants also contend that the timber sale will significantly affect the hydrologic and vegetative character of the Yank Swamp area. In sup-port of this contention, they rely largely on the opinion of Dr. Donald F. Potts, an associate professor of watershed management at the University of Montana's School of Forestry, assessing the adequacy of the EA's conclusions regarding the effect of the timber sale. Potts disagrees with BLM's conclusion in the EA that regeneration will occur within 5 years, noting that various factors (including drought, heat stress, frost, pathogens, competition, and animals) would impede regeneration. Even assuming that regeneration occurs, he states, studies of clearcutting in similar areas had shown that complete hydrologic recovery would take 35 to 50 years. Finally, he states: "I strongly believe that timber harvest in this sensitive area will permanently change its hydrologic and vegetative character." 11/

The record, however, supports BLM's conclusion that the sale area will achieve acceptable restocking by natural regeneration within 5 years. The principal evidence relied upon by BLM is the successful regeneration of nearby clearcut areas on BLM and National Forest lands. See EA at 3-4. Appellants challenge reliance on this evidence, asserting that soil mois-ture conditions are different on these nearby areas (Response to Answer

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11/ Dr. Potts stated his opinion in a May 17, 1985, letter to Jon Roush. He sets forth his determination regarding the increased annual "water yield" attributable to clearcutting in the sale area, which he terms a "rough preliminary estimate," stating that clearcutting would generate an "additional 4.2 inches of water available for runoff annually" (Exh. 5 attached to Protest at 6). He concludes: "The problem is that on the forested land surrounding Yank Swamp, with its numerous depressions, gentle slopes and fine-textured soils restricting lateral movement of water, the inevitable consequence will be to raise water tables higher, expand the saturated areas, and extend the time which the seasonally saturated ground is saturated. Regeneration will be impossible on saturated ground and residual timber left for buffer strips along the current saturated areas will drown in a relatively short period of time." Id.

at 11). However, they have presented no evidence disputing BLM's conclusions that these nearby areas experienced successful regeneration and that the regenerative success of these areas can be extrapolated to the sale area. Thus, appellants have failed to establish error in BLM's determination that the sale area will naturally regenerate within 5 years. See In re Chapman-Keeler Timber Sale, 80 IBLA 237, 243 (1984); Robert C. Salisbury, 79 IBLA 370, 374 (1984).

In addition, in a July 12, 1985, letter to Jon Roush, the Area Manager, relying on the analysis of Potts' letter by BLM specialists, went on record concluding that regeneration would not be precluded by such factors as drought, heat stress, and frost. Furthermore, he stated that an increase in annual water yield of 4 inches would not be unusual following clearcutting, and that evidence of past timber harvests indicated that the increased water yield would not adversely affect the ability of the area to regenerate. He admitted, however, that complete hydrologic recovery might take up to 50 years. 12/

Thus, the evidence on the question of whether the sale area will naturally regenerate within 5 years, given such factors as drought, heat stress, frost, and an alteration in the hydrologic character of the sale area, was at equipoise at the time of the Area Manager's April 1987 ROD. 13/ On the one hand, there was the opinion of Dr. Potts that it would not, especially given the effect of the timber sale on the hydrologic character of the area; while, on the other hand, there was the opinion of BLM experts that it would, even given the effect on the hydrologic character of the area. In this situation, we must conclude that appellants have not established that the area will not regenerate naturally within 5 years. At best, this constitutes a mere difference of opinion, which is not sufficient to overturn BLM's conclusion. See In Re Trailhead Timber Sale, 97 IBLA 8 (1987); Upper Floras Timber Sale, supra; Robert C. Salisbury, supra; Cascade Holistic Economic Consultants, 60 IBLA 293 (1981).

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12/ Along with its answer, BLM has provided an Oct. 1, 1987, memorandum by Dr. Vito A. Ciliberti, Jr., who has a doctorate in soils and hydrology. In that memorandum, Ciliberti concludes that, at most, there will be an increase in groundwater elevation of .5 inches as a result of clearcutting in the sale area, which increase is "of no consequence" (Exh. 3 attached to Answer at 2). Appellants take issue with BLM's reliance on the Ciliberti memorandum because it was prepared after issuance of the Area Manager's April 1987 ROD, arguing that BLM cannot rely on information developed after it made its finding of no significant impact. However, BLM's finding that the timber sale would not significantly affect the environment by altering the hydrologic and vegetative character of the sale area was based on analyses by BLM experts performed prior to issuance of the Area Manager's April 1987 ROD, including that reflected in the Area Manager's July 1985 letter to Jon Roush. In any event, consideration of the Ciliberti memorandum is not improper, as it serves to further substantiate the findings in the EA. See The Shoshone-Bannock Tribes, supra at 207.

13/ The Ciliberti memorandum, discussed above, tips the evidentiary balance in BLM's favor. Thus, if it were considered, appellants would also not prevail.

Nor can we say that appellants have demonstrated that the timber sale will effect a permanent, significant change in the hydrologic and vegetative character of the sale area. We have only the opinion of Dr. Potts extrapolated from conclusions regarding increased water yield, which conclusions are accepted by BLM, that such a permanent change will occur. Paired against this is the opinion of BLM experts that no such permanent change will occur. As above, this difference of opinion is not sufficient for appellants to meet their burden of demonstrating a significant effect on the human environment. Id.

More generally, appellants contend that BLM's finding of no significant impact, which was made as part of the ROD's, does not comport with the requirement in 40 CFR 1508.13 that a Federal agency "briefly [present] the reasons why an action \* \* \* will not have a significant effect on the human environment." We disagree. BLM undoubtedly has not provided a detailed discussion regarding why the Yank Swamp timber sale will not have a significant effect, either in the Area Manager's April 1987 ROD or the EA. Nevertheless, the EA provides sufficient information regarding the anticipated effect of the sale on such resource values as wildlife and the hydrology of the area that it is clear why BLM regards the design of the sale as adequate to reduce any adverse effect on the environment to an insignificant level. While appellants also generally challenge the adequacy of these design features, they have not demonstrated that they are inadequate. See In re Blackeye Again Timber Sale, supra at 111.

Therefore, we conclude that appellants have not substantiated their conclusion that the Yank Swamp timber sale will significantly affect the human environment. Nor have they demonstrated that the timber sale may have a significant environmental impact or that BLM's review was so flawed that it cannot yet be determined whether this was the case. See Fritiofson v. Alexander, supra at 1238. Based on the mitigating measures imposed on the sale by BLM, we hold that its decision was reasonable.

#### Water Quality Degradation

Appellants contend that BLM failed to consider the potential for the degradation of water quality in streams draining the Yank Swamp area as a result of the erosion of the sale area and ensuing sediment being carried off that area by the increased water yield owing to clearcutting, which, they maintain, would violate strict State water quality standards. In the EA, at page 4, BLM reported that, with the exception of Yank Swamp itself and a swampy area in the NE¼ sec. 26, which areas would not be subjected to timber harvesting, the erosion hazard of the sale area was "low." 14/ The

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14/ BLM's assessment of the erosion potential of the sale area was based on a mapping of the soil types present in the area. Those areas in which the erosion hazard was described as low were deemed to have deep soils with little rock content. In support of their assertion that BLM should have considered the potential degradation of water quality from sedimentation as a result of the planned timber sale, appellants refer to a May 28, 1985, assessment of a nearby timber sale ("Geotechnical Investigation of the Howell Timber Sale Area"), which reported that that sale area "consists of

EA concluded, at page 10, that "[s]oil loss and sediment yield would be expected to be insignificant." In addition, the Area Manager explained in his August 1987 decision denying appellants' protest, at page 6, that BLM will use certain best management practices, including leaving buffer zones around Yank Swamp, restricting activities during high soil moisture conditions and yarding on relatively dry or frozen ground, which will eliminate or minimize non-point source pollution. All of this is sufficient to indicate that BLM fully considered the potential for degradation of water quality from sedimentation at the time of preparation of the EA.

In these circumstances, it is incumbent upon appellants to offer evidence demonstrating that the timber sale will result in the degradation of water quality in violation of State water quality standards despite the reliance by BLM on best management practices. See Northwest Indian Cemetery Protective Association v. Peterson, 764 F.2d 581, 588-89 (9th Cir. 1985). This appellants have failed to do. They offer only the opinion of Dr. Potts that "[d]epending on proximity to active springtime stream courses (which should increase in size and number following harvest) soil loss and sediment yield may be of greater significance and consequence to the swamp itself, than the EA is willing to allow" (Exh. 5-5 attached to Protest). However, Dr. Potts' opinion was confined to the effect of increased sediment yield to the swamp itself, rather than streams draining the swamp area. Even assuming that some of that sediment would enter these streams, this evidence is not sufficient to establish that water quality will be adversely affected to the point that State water quality standards will be violated. See In re Letz Boogie Timber Sale, 102 IBLA 137, 144 (1988).

Moreover, BLM's Ciliberti memorandum provides further support for the conclusion that water quality will not be adversely affected in violation of State water quality standards. Using the same model employed by Potts, Ciliberti determined that the planned timber harvest would increase runoff from the sale area by 3.7 percent, concluding that "[p]roposed logging methods, seasonal restrictions, and [best management practices] should be adequate to avoid or minimize soil movement off the cutting unit" (Exh. 3-1 attached to Answer). <sup>15/</sup> Appellants have not effectively challenged this conclusion.

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fn. 14 (continued)

granitic materials from the Idaho batholith, which have been heavily glaciated" and concluded that, "[b]ecause these materials are so erosive when disturbed or devegetated, serious disruption of water quality will occur" (Protest at 55 (quoting from Exh. 6 attached to Protest at 4)). Appellants have offered no evidence, however, that the areas where timber harvesting will take place in the Yank Swamp area are of this character.

<sup>15/</sup> Dr. Ciliberti stated, however, that the increased runoff would erode recently channelized portions of Swamp Creek downstream from the sale area and concluded that "[i]t is not known how sediment load will increase in this instance" (Exh. 3 attached to Protest at 2). Appellants contend that the timber sale should not proceed until BLM knows the extent to which the sediment load will increase. It is clear that, while Dr. Ciliberti did not know the actual extent to which sediment load would increase, he regarded

The Protection of "Wetlands" Under Executive Order No. 11990

Appellants contend that the timber sale violates Executive Order No. 11990 of May 24, 1977 (EO 11990), 3 CFR 121 (1978), which requires the protection of "wetlands." In particular, appellants assert that BLM has completely failed to consider the impact of the timber sale on Yank Swamp, which, they argue, is a "wetlands" within the meaning of EO 11990.

BLM did consider what portions of the Yank Swamp area constitute "wetlands" under EO 11990 and made specific accommodations to protect them. <sup>16/</sup> In his August 1987 decision, the Area Manager held that "only small discontinuous" areas of Harvest Unit No. 8 "marginally qualify as wetlands" within the meaning of the executive order, "due to the type of vegetation present and seasonal flooding." The Area Manager further held, "Cutting units are not located in wetland areas, and in fact, substantial changes in size and location of [Sale Units Nos. 2 and 4] were made to avoid inclusion of small scattered Carex wetlands or cutting to the edge of a large bog. Yank Swamp itself will be protected by buffer strips of [f] vegetation to maintain stream temperatures, water quality, and prevent stream sedimentation and stream channel erosion" (Decision at 6). Finally, he held that BLM was abiding by its policy for the protection of wetlands in accordance with EO 11990, as set forth at 45 FR 7889 (Feb. 5, 1980).

It is thus evident that BLM has given adequate consideration to protection of the wetlands present in the Yank Swamp area from timber sale activity, and that the wetlands will be adequately protected, consistent with EO 11990. Appellants have offered no evidence to dispute BLM's conclusions as to what portions of the Yank Swamp area constitute "wetlands" or to show that BLM's protective measures are inadequate.

Cumulative Environmental Impacts

Appellants next contend that BLM failed to consider the cumulative environmental impacts of the planned timber sale and timber sale activity on adjacent National Forest land in the past and reasonably foreseeable future. BLM is required to consider the potential cumulative impacts of a planned action together with other past, present, and reasonably foreseeable future actions. See 40 CFR 1508.7 and 1508.27(b); Fritiofson v. Alexander, supra at 1243-44; Colorado Environmental Coalition, 108 IBLA 10, 16 (1989). With one notable exception, discussed below, the EA contains no discussion of cumulative impacts.

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fn. 15 (continued)

this effect as insignificant because he recommended that, "insofar as hydrology and soils are concerned, [the timber harvest] should proceed." Id.

<sup>16/</sup> The term "wetlands" is defined in EO 11990 as those areas "that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction." 3 CFR 123 (1978).

In his August 1987 decision, at page 11, the Area Manager stated that "[c]umulative impacts were considered." That may be so, but without any discussion in the EA or elsewhere there is no basis for the public or the Board to assess the adequacy of such review. Thus, for the most part, we must conclude that no cumulative impacts analysis was performed.

However, BLM is only required to consider cumulative impacts which "might be expected." In re Long Missouri Timber Sale, 106 IBLA 83, 86 n.2 (1988). Appellants merely assert that cumulative impacts might occur without offering any evidence as to what these impacts might be or the likelihood of their occurrence. The mere assertion that cumulative impacts will occur as a result of a planned action is not sufficient to require BLM to consider cumulative impacts. See In re Letz Boogie Timber Sale, supra at 142 n.8; In re Blackeye Again Timber Sale, supra at 110-11.

To the extent that we can discern what cumulative impacts appellants portend, we do not view most of them as likely. <sup>17/</sup> The only potential cumulative impact likely to occur is the effect on moose and elk populations from the removal of additional forest cover, in view of past clear-cuts on adjacent National Forest land. <sup>18/</sup> See State of Wyoming, supra. However, this is the one cumulative impact considered in the EA, which, at page 3, acknowledged the extent of past clearcutting in the sale area and nearby areas. Further, the EA indicates, at page 10, that BLM considered the cumulative effect of removal of cover within the overall habitat analysis unit.

#### Impact of the Sale on Swamp Creek and Moose Creek

Appellants also object to the timber sale on the basis that BLM has failed to consider the fact that Swamp Creek and Moose Creek, which flow through the sale area, are being considered by the Forest Service for designation as part of the national wild and scenic rivers system. In particular, appellants argue that BLM must consider any potential impact of the sale to the wild and scenic character of these creeks. BLM counters that Swamp Creek and Moose Creek have little potential for inclusion in the national wild and scenic rivers system because most of the land ownership

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<sup>17/</sup> It is particularly hard to discern what appellants regard as cumulative impacts because their assertions regarding such impacts appear to be merely reassertions of the individual impacts anticipated by them in the sale area. See Protest at 60; SOR at 24. Appellants have generally failed to identify how the planned timber sale, in conjunction with past timber sales in the area, would cumulatively affect any given aspect of the environment.

<sup>18/</sup> Parenthetically, we note that the Area Manager in his August 1987 decision, at page 11, reported that the Forest Service has no planned timber sales in the vicinity of Yank Swamp. Thus, despite appellants' assertion to the contrary, there is no basis to conclude that any other timber sales on National Forest land in the vicinity of Yank Swamp are reasonably foreseeable in the future. BLM is not required to assess the impact of possible timber sales. See Glacier-Two Medicine Alliance, supra at 150-51.

along the creeks is private. In addition, Swamp Creek is described by BLM as being "only a few feet wide" (Answer at 31). BLM notes that the creeks were not identified during BLM's land-use planning process as having any such potential, and that the Forest Service determined that the creeks were potentially eligible for inclusion in the system only "because portions of the streams were on [National Forest] land and they were included in an existing inventory of Northwest rivers." 19/ Id. at 32. In view of the unlikelihood that these creeks would be included in the national wild and scenic rivers system, we agree that BLM was not required to consider the impact of the timber sale on the wild and scenic character of the two creeks.

We note also that BLM did consider the impact of the timber sale on streams passing through the sale area, providing in the EA, at page 2, for the reservation of "[s]treamside buffer strips" in the case of all of the alternatives considered. The Area Manager ultimately adopted this mitigating measure in his April 1987 ROD. Appellants have not demonstrated that such buffer strips will not adequately protect such streams. See Hoosier Environmental Council, supra at 171-72.

Appellants note that 36 CFR 297.4, in cases of "Study River[s]" administered in whole or in part by the Secretary of Agriculture, precludes the issuance of a license or permit for a "water resources project" except where the Secretary of Agriculture has made an appropriate determination. Such project is defined in 36 CFR 297.3 to include the "construction of developments which would affect the free-flowing characteristics of a \* \* \* Study River." Appellants assert that timber harvesting will affect the free-flowing characteristics of the creeks.

This argument fails for several reasons. First, neither Swamp nor Moose creek constitutes a "study river" within the meaning of 36 CFR 297.4. That term is defined as a "river and the adjacent area within one quarter mile of the banks of the river which is designated for study as a potential addition to the National Wild and Scenic Rivers System," pursuant to section 5(a) of the Wild and Scenic Rivers Act, as amended, 16 U.S.C. § 1276(a) (1982). 36 CFR 297.3; see also 16 U.S.C. § 1278(b) (1982). Section 5(a) of the Wild and Scenic Rivers Act does not designate Moose Creek or Swamp Creek. 20/ Second, no portion of the sale area could be considered to be part of a "study river" by virtue of its proximity to Moose

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19/ This conclusion is supported by the May 22, 1987, letter in which the Forest Supervisor, Beaverhead National Forest, notified "Forest Plan Participant[s]" that the Forest Service was assessing the eligibility "of all rivers included in or crossing Forest land," including Swamp Creek and Moose Creek, for possible inclusion in the national wild and scenic rivers system (Exh. 4 attached to Protest at 1 (emphasis added)).

20/ Section 12(a) of the Wild and Scenic Rivers Act, as amended, 16 U.S.C. § 1283(a) (1982), does require the Department to take such action as is necessary to protect rivers included in or considered for inclusion in the national wild and scenic rivers system pursuant to particular provisions of the statute in accordance with the purposes of that Act, with particular

Creek because, as BLM points out, no portion of the sale area is within one-quarter mile of the creek. See Answer at 31. Finally, we agree with BLM that timber harvesting does not constitute a water resources project. There is no "construction of developments" involved and, even assuming that there were, there is no evidence that timber harvesting will in any way affect the free-flowing characteristics of the two creeks. Accordingly, we conclude that timber harvesting is not precluded by 36 CFR 297.4.

#### Requirement to Obtain a Permit Under the Clean Water Act

Appellants challenge the timber sale on the basis that BLM failed to obtain a permit from the Army Corps of Engineers for the "development of Swamp Creek" (Protest at 44). In their SOR, at page 22, appellants further state that a permit is required for the construction of a road in an area of "overland flow." In essence, appellants assert that BLM is required to obtain a permit pursuant to section 404 of the Clean Water Act, as amended, 33 U.S.C. § 1344 (1982), and 33 CFR Part 323, because it is authorizing the discharge of dredged or fill material into "waters of the United States," as that term is expansively defined in 33 CFR 328.3(a). 21/

The record contains no evidence that the timber sale would entail the placement of dredged or fill material into Swamp Creek as a result of the planned timber sale. However, a road (R-4) will be constructed across wet areas south of Yank Swamp, thus, according to appellants, affecting the overland flow through those areas. However, appellants have presented no evidence that this overland flow is properly considered "waters of the United States" within the meaning of the Clean Water Act, since they have offered nothing to indicate that use of those areas could affect interstate or foreign commerce. Thus, we conclude that no section 404 permit is required.

Even assuming that the overland flow constitutes waters of the United States, 33 CFR 323.4(a), as BLM points out, exempts the discharge of dredged or fill material as the result of the construction of a forest road in accordance with best management practices from the requirement to obtain a permit. BLM asserts that road R-4 falls within that exemption and, in the absence of any evidence to the contrary, we must agree. 22/

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fn. 20 (continued)

attention to "scheduled timber harvesting \* \* \* which might be contrary to" its purposes. This statutory provision, however, has no application in the case of Swamp Creek and Moose Creek because they do not fall within the enumerated category of rivers.

21/ That regulation defines waters of the United States to include "[a]ll other waters such as \* \* \* streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 CFR 328.3(a)(3).

22/ Appellants also suggest that construction of road R-4 will not comport with the requirements in 33 CFR 323.4(a)(6) regarding roads exempt from the section 404 permit requirement, but have presented no evidence in support of this suggestion. Thus, we give it no credence.



Spread of Noxious Weeds

Appellants assert that BLM failed to consider the potential spread of noxious weeds, specifically knapweed, into the sale area as a result of the removal of timber. Appellants note that knapweed could be transported into the sale area by road-building and timber-harvesting equipment and then take root on disturbed areas and that, once established, would pose a significant threat to the existing rangeland and big game habitat. BLM responds that it will take adequate precautions to prevent the introduction of knapweed into the sale area, requiring that all logging equipment be washed before entering the area. In addition, BLM states,

During the analysis of the Yank Swamp timber sale, the Range Specialist did not feel noxious weeds would be a serious impact from the timber sale activity. However, it has become standard practice for BLM in Southwest Montana to include prevention and control measures in timber sale contracts through requiring seeding and fertilizing of roads and trails and contribution of funds to control any noxious weeds that may be spread. Those requirements are included in the Yank Swamp timber sale contract. Noxious weeds have been considered and measures for control, if necessary, have been allowed for.

(Answer at 36).

Appellants have presented no evidence that the precautions to be taken by BLM will not prevent the spread of knapweed or other noxious weeds into the sale area or that, if inadvertently introduced, BLM cannot control any infestation. Moreover, BLM's recognition of this problem and inclusion of appropriate measures in the sale contract constitute adequate consideration of the matter.

Public Participation in the Environmental Review Process

Appellants also contend that BLM's environmental review process violates the NEPA requirement regarding public participation in such a process, specifically the directive in 40 CFR 1500.1(b) that "environmental information [be] available to \* \* \* citizens before decisions are made and before actions are taken."

Appellants allege that the Area Manager's April 1987 ROD (ROD-2) was issued "after the timber sale ha[d] been publicly noticed" (Protest at 17), suggesting that the sale went forward without the public being allowed to participate. In this particular, appellants are simply mistaken. <sup>23/</sup> The notice of the Yank Swamp timber sale was not published in the local newspapers until June 22, 1987, after the date of issuance of ROD-2 on April 21, 1987. Further, BLM provided appellants' counsel and other members of the public with notice of the sale prior to its being publicly

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<sup>23/</sup> Appellants' assertion seemingly contradicts their earlier statement in the protest, at page 9, recognizing that the ROD "is dated 21 April 1987, about a month before the sale was officially noticed." (Emphasis added.)

noticed, evidently to ensure that they would have an opportunity to comment prior to the sale.

In making this argument, appellants also overlook that Departmental regulations, 43 CFR 5000.3, guarantee third parties the right to protest any timber sale, and to appeal the denial of their protest to this Board. But BLM went beyond what is strictly required by the regulations in involving the public in its decision making on this sale. <sup>24/</sup> The public in general and appellants in particular had an opportunity not only to protest the ROD-2 but also, earlier, to comment on the draft EA. During the 3 years that elapsed from the Area Manager's approval of the EA until issuance of the final ROD, appellants and other members of the public evidently did contribute to BLM's deliberations. <sup>25/</sup>

We conclude that there was ample opportunity for public participation in the environmental review process before the Area Manager made his final decision. See Curtin Mitchell, *supra* at 282; In re Otter Slide Timber Sale, *supra* at 383-84; In re Lick Gulch Timber Sale, *supra* at 307-08, 90 I.D. at 215.

#### BLM's Estimate of the Allowable Cut for the Big Hole Valley

Appellants also contend that BLM overestimated the allowable cut in the Big Hole Valley drainage area, which includes the sale area, with the result that the sale will violate the requirement in 43 CFR 1725.3-3(g) to ensure a sustained yield of timber and other forest products: "The main problem \* \* \* is the removal of old growth at a faster rate than it will be replaced by harvestable second growth" (Protest at 32). See also 43 U.S.C. §§ 1701(a)(7) and 1702(h) (1982). In support of their assertion that BLM has overestimated the allowable cut, appellants refer to reviews of BLM's allowable cut analysis performed by Cascade Holistic Economic Consultants.

We need not consider the question of whether BLM properly estimated the allowable cut in the Big Hole Valley drainage area. That estimation was taken from the land use planning document, specifically the management framework plan, generated by BLM prior to preparation of the EA in connection with the proposed Yank Swamp timber sale. See Protest at 30-31. The time for filing a protest against this land use plan with the Director, BLM, has long since passed. See 43 CFR 1601.6-1 (1979). Moreover, the Board does not have any jurisdiction to review the adequacy of the plan. Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23, 94 I.D. 35, 38 (1987); Wilderness Society, 90 IBLA 221, 224 (1986); Oregon Natural Resources Council, 78 IBLA 124, 127 (1983). In any case, we conclude that the adequacy of BLM's analysis of the total allowable cut for the Big Hole Valley drainage area is outside the scope of the present appeal. In re Blackeye Again Timber Sale, *supra* at 109.

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<sup>24/</sup> BLM even went so far in accommodating appellants as to attempt to extend the regulatory deadline for them to protest, an action we have noted is unauthorized by regulation.

<sup>25/</sup> In fact, as discussed above, it appears that third parties, including appellants, did participate in the process, although the present record does not reveal the details of such participation.

BLM's Cost/Benefit Analysis

Appellants also challenge BLM's positive cost/benefit analysis of the timber sale in the EA, contending that BLM can proceed with the sale only at an economic loss. It is enough to observe that an appellant lacks standing to challenge a timber sale on the basis that BLM is not receiving an adequate economic return, either above or below its costs. See In re Thompson Creek Timber Sale, supra at 243-44. That is the situation here.

Except to the extent that they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by appellants have been considered and are rejected. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954); Glacier-Two Medicine Alliance, supra at 156.

Request for Hearing

Appellants have requested a hearing before an Administrative Law Judge pursuant to 43 CFR 4.415, which request is opposed by BLM. <sup>26/</sup> While the Board has the authority, at the request of an appellant, to order a hearing, we will decline to do so where there is no material issue of fact which must be resolved. See Woods Petroleum Co., 86 IBLA 46, 55 (1985). That is the situation here. Appellants have failed to establish that disposition of this case hinges on the resolution of a material issue of fact. Accordingly, appellants' request for a hearing is denied. See In re Crooked Cedar Timber Sale, 83 IBLA 329, 333 (1984).

Therefore, we conclude that the Area Manager, in his August 1987 decision, properly denied appellants' protest of the Yank Swamp timber sale.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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David L. Hughes  
Administrative Judge

I concur:

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C. Randall Grant, Jr.  
Administrative Judge

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<sup>26/</sup> By order dated May 12, 1988, the Board initially denied appellants' request for a hearing as "untimely filed under the provision of 43 CFR 4.415." However, we noted that the request had been made part of the record and "will be considered \* \* \* when the appeal is reviewed." We, herein, finally dispose of appellants' request.